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No. 414

In the Supreme Court of the United States

OCTOBER TERM, 1929

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

HOOD RUBBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

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THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

HOOD RUBBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Thomas W. White, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above case on June 25, 1929, affirming the judgment of the District Court of the United States for the District of Massachusetts.

STATEMENT

The respondent, a Massachusetts corporation, filed a tentative return of its income and excess-profits tax for the year 1918 on March 14, 1919.

(R. 22, 23.) This return, Form 1031 T, entitled "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," showed an estimated tax of $300,000 and was accompanied by respondent's check for $75,000, one-fourth of that amount. (R. 8–10.) On July 14, 1919, within the extended period of time, the respondent filed its completed return. (R. 23.) Under date of January 26, 1924, the respondent and the Commissioner executed a waiver in the following form (R. 11–12):

January 26, 1924.
(Date)

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Hood Rubber Company and Affiliated Companies of Watertown, Mass., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Companies for the year nineteen hundred and eighteen under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the tax payer and will

remain in effect for a period of one year after the expiration of the statutory period or limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

HOOD RUBBER COMPANY,
Taxpayer.
By FREDERICK C. HOOD,
President.
D. H. BLAIR, *Commissioner.*

The Revenue Act of 1924 was approved and took effect on June 2, 1924. (43 Stat. 253, 353.)

An additional tax of $39,043.99 was assessed on March 18, 1925, and collected by distraint on December 15, 1926. (R. 24, 25.) Claim for refund was filed and rejected, and the respondent brought action in the District Court for the District of Massachusetts to recover the tax on the ground that both the assessment and the collection thereof were barred by the statute of limitations. A jury was waived by written stipulation, and the case was tried to the court on an agreed statement of facts. (R. 3, 22, 125.)

The Government contended (1) that the statute of limitations did not commence to run until the filing of the completed return on July 14, 1919, and (2) that since the assessment was made within the statutory period as extended by waiver and subsequent to the effective date of the Revenue Act of 1924, Section 278 (d) of that Act authorized col-

lection at any time within six years after the assessment. The District Court did not decide whether the statute began to run from the filing of the tentative return or from the filing of the completed return, but disposed of the case upon the second issue, holding that the waiver constituted a contract which required that the Government not only assess but also collect the additional tax within six years after the filing of the return, and that Section 278 (d) of the Revenue Act of 1924 did not enlarge the collection period specified in the waiver. It accordingly entered judgment for the respondent.

On appeal, the Circuit Court of Appeals did not consider the point upon which the District Court based its decision but affirmed its judgment, on the first issue, holding that the statute of limitations was set in motion by the filing of the tentative return and that both the assessment and collection of the tax were too late.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the statute of limitations for the assessment and collection of taxes was set in motion by the filing of the tentative return.

(2) In not holding that the tax, assessed within the statutory period, as extended by waiver, and after the enactment of the Revenue Act of 1924, could be collected, by virtue of Section 278 (d) of that Act, at any time within six years of the assessment.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals in the instant case is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 F. (2d) 895. The *Florsheim case,* No. 118, October Term, 1929, is now pending before this Court on the taxpayer's petition for a writ of certiorari and a memorandum filed by the Solicitor General calling the attention of the Court to the conflict of decisions resulting from the decision of the Circuit Court of Appeals in the instant case.

A similar, although not identical, question is raised in the pending petition for a writ of certiorari in *Commissioner* v. *The Pilliod Lumber Co.,* No. 356, October Term, 1929.

The instant case is of general importance. The questions presented are involved in a number of cases now pending before the courts, the Board of Tax Appeals, and the Treasury Department. For the information of taxpayers generally and for the guidance of the Treasury Department in its administration of the tax laws, we submit that the questions should be authoritatively determined by this Court.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit should be granted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

SEPTEMBER, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts (R. 28–31) is reported in 28 F. (2d) 54. The opinion of the Circuit Court of Appeals (R. 39–44) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 25, 1929. (R. 44.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the statute of limitations for the assessment and collection of taxes, provided by Section 250 (d) of the Revenue Act of 1918 and of the Revenue Act of 1921, is set in motion by the filing of a tentative income tax return.

(2) Whether an additional tax for the year 1918, assessed within the statutory period as extended by waiver and subsequent to the enactment of the Revenue Act of 1924, may be collected, pursuant to Section 278 (d) of that Act, at any time within six years of the assessment.

STATUTES INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1075, 1081–1083, are as follows:

SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *

SEC. 241. (a) That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227.

* * * * *

SEC. 227. (a) That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March. The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

* * * * *

SEC. 250. (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct

amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

* * * * *

(d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. * * *

* * * * *

The pertinent provisions of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, are as follows:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes * * * due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * *.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299–301, 352, are as follows:

* * * * *

SEC. 277. (a) Except as provided in section 278 [and other sections not here important] (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. Title 26, Sec. 1057.)

* * * * *

SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C. Title 26, Sec. 1061.)

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C. Title 26, Sec. 1062.)

SEC. 280. If after the enactment of this Act the Commissioner determines that any

assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277. (U. S. C. Title 26, Sec. 280.)

SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

* * * * *

(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the

assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. * * * (U. S. C. Title 26, Sec. 1260.)

STATEMENT

A statement of the facts and of the errors relied on is contained in the above petition.

ARGUMENT

The petitioner contends that the tentative return was not the return required by law. Section 239 of the Revenue Act of 1918 provides that every corporation shall make a return "stating specifically the items of its gross income and the deductions and credits allowed by this title." The purpose of such a return is to furnish the taxing authorities some basis for making an assessment against the taxpayer. *Paso Robles Mercantile Co.* v. *Commissioner* (C. C. A. 9th), decided July 1, 1929 (not yet reported).

The tentative return filed by the respondent on March 14, 1919, disclosed none of this information, but contained merely the taxpayer's estimate of the total tax. (R. 10.) If this were considered the return required by law, it would be impossible for the Commissioner of Internal Revenue to comply with Section 250 (b) of the Revenue Act of 1918, which

provides that he shall examine the return and determine whether the correct amount of tax is greater or less than that shown. The information which would enable the Commissioner to make an assessment was not furnished until the completed return was filed on July 14, 1919. It must follow that the statute of limitations for the assessment should begin to run only from the filing of the completed return. Under the contrary view taken by the Circuit Court of Appeals, the filing of a tentative return, imparting no information to the Commissioner, would set the statute of limitations in motion and the five-year period for assessment might well expire even though the Commissioner had no available information to determine the correct amount of the tax.

Such a holding, we believe, is unsound. It is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 F. (2d) 895, *supra.*

The United States Board of Tax Appeals has uniformly held that the filing of a tentative return does not set the statute in motion. *Appeal of Dallas Brass & Copper Co.,* 3 B. T. A. 856; *Appeal of Matteawan Manufacturing Co.,* 4 B. T. A. 953; *Appeal of Boston Hide & Leather Co.,* 5 B. T. A 617; *Pilliod Lumber Co.* v. *Commissioner,* 7 B. T. A. 591; *Corona Coal & Coke Co.* v. *Commissioner,* 11

B. T. A. 240. *Contra: Brandon Corporation* v. *Jones* (E. D. S. C.) decided March 30, 1929 (not yet reported); *Rasmussen* v. *Brownville-Canty Carpet Co.* (C. C. A. 9th), 31 F. (2d) 89 (in which two judges refrained from expressing an opinion on the point).

If, as we contend, the statute did not start to run until the filing of the completed return, on July 14, 1919, the Government had until July 14, 1924, to assess the tax for 1918. The waiver extended this time limit to July 14, 1925. The tax was assessed on ~~July 13, 1924~~, subsequent to the effective 18-1925 date of the Revenue Act of 1924 (June 2, 1924). Therefore, the period of limitations for the collection of this tax was controlled by Section 278 (d) of the Revenue Act of 1924, which provides that the tax may be collected at any time within six years from the date of the assessment. *Russell* v. *United States,* 278 U. S. 181. The collection was made December 15, 1926, well within that six-year period.

We submit that the position taken by the District Court in construing the waiver as a contract, and as such unaffected by the Revenue Act of 1924, is untenable. *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 F. (2d) 895, *supra; Loewer Realty Co.* v. *Anderson* (C. C. A. 2d), 31 F. (2d) 268; *Greylock Mills* v. *Commissioner* (C. C. A. 2d), 31 F. (2d) 655; *Bank of Commerce* v. *Rose* (N. D. Ga.), 26 F. (2d) 365.

CONCLUSION

In view of the conflict of decisions and of the importance of the questions involved, it is respectfully submitted that writ of certiorari should be issued.

CHARLES E. HUGHES, Jr.,
Solicitor General.

CLAUDE R. BRANCH,
SEWALL KEY,
BARHAM R. GARY,
Special Assistants to the Attorney General.

SEPTEMBER, 1929.

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